February, 1992

HONOR ROLL

382nd Session, Basic Law Enforcement Academy, October 1 through December 19, 1991

President:	*Officer Clifford G. Sether, King County Police Department*
Best Overall:	*Deputy Ned B. Newlin - Kitsap County Sheriff's Department*
Best Academic:	*Deputy Ned B. Newlin - Kitsap County Sheriff's Department*
Best Firearms:	*Officer Michael W. Starrett - King County Police Department*
Best Mock Scenes:	*Officer Walter M. Hayden - Seattle Police Department*

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Corrections Officer Academy - Class 164 - November 18 through December 20, 1991

Highest Overall:	*Officer Kay Bishop - Pierce County Sheriff/Jail*
Highest Academic:	*Officer Kay Bishop - Pierce County Sheriff/Jail*
Highest Practical Test:	*Officer Gay Towne - King County Adult Detention*
Highest in Mock Scenes:	*Officer Kay Bishop - Pierce County Sheriff/Jail*
Highest Defensive Tactics:	*Officer Christine Lawson - Kitsap County Sheriff's Department*
	Officer Faasiu Muliufi - Pioneer Fellowship House

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WASHINGTON STATE COURT OF APPEALS

NO "INTERROGATION" OCCURRED IN OFFICERS' BEDSIDE VIGIL AT HOSPITAL

State v. Peerson, 62 Wn. App. 755 (Div. I, 1991)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> After sustaining serious injuries during his arrest, Peerson was taken to a Fargo, North Dakota, hospital where he remained through December 31. He was in a halo, a device physically attached to his head to prevent or limit head movement because of a bullet still in his neck. The halo caused him to hear strange sounds in his head and to magnify sounds when something touched the halo.
>
> Fargo police guarded him closely 24 hours a day in his hospital room. The officers kept a log in which they recorded notes of everything Peerson said. Peerson was aware that the officers were taking notes of his conversations while he talked on the telephone.
>
> For the first few days of his hospitalization, Peerson was "very incapacitated." After that, he was handcuffed and his uninjured leg was secured to the bed. On December 9, Peerson was given morphine and Valium and had been sleeping before an officer woke him and read him his Miranda rights. That same afternoon, Peerson asked Officer Warren about the procedure for getting a lawyer. Officer Warren responded that an attorney could be appointed for Peerson once he was arraigned in the local county court, or that Peerson could call a local private attorney. Peerson does not contend that he pursued the matter further.
>
> On December 15, depressed about his impending leg surgery and emotionally distraught after a telephone conversation with his girl friend, Peerson lost control of himself and asked to be handcuffed with both hands to the bed. A psychiatrist was called who gave Peerson some Valium before he left. A half hour later, Peerson telephoned his father. He was still upset and handcuffed to his bed. Officer Warren overhead Peerson tell his father, "I should have done everybody in that owed me money. I could have been Rambo, but I left town." Between the conversation with his girl friend and the telephone call to his father, Peerson made other incriminating statements to Officer Warren. He told Warren "that everybody in town that owed him money thought he was going to kill them." He also said that one guy owed him some money and Peerson "bit [the guy's] nose off."
>
> Defense counsel moved to suppress the statements made by Peerson to his father and Officer Warren. The trial court denied the motion, finding that Peerson had not made the statements in response to any police interrogation, that he knew Officer Warren was listening to and taking notes of his telephone conversations, and that his emotional and medicated state went to the weight rather than the

admissibility of the statements. Peerson assigns error to the trial court's ruling, contending that the incriminating statements were inadmissible because he did not make them voluntarily and because he was not appointed a lawyer after he asked about the procedure for obtaining one.

[Footnote omitted]

ISSUE AND RULING: Should Peerson's statements made to Officer Warren, as well as his statements to other persons overheard by Officer Warren, have been excluded as involuntary products of unlawful police interrogation? (ANSWER: No, there was no interrogation). Result: King County Superior Court convictions for aggravated first degree murder (two counts) and first degree assault (two counts) affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The rights to counsel and to remain silent [under the Fifth Amendment -- LED Ed.] apply only to situations in which the defendant is in custody and is being interrogated. Edwards v. Arizona, 451 U.S. 477 (1981). Peerson, under 24-hour police surveillance in his hospital room, was clearly in custody. However, it is undisputed that Peerson did not make the statements in response to any questions posed by Officer Warren and that the statements were spontaneous. Thus, we find no evidence that Peerson was being interrogated when he made the incriminating statements.
>
> Peerson argues, however, that his physical pain and depression, the confinement of his head in the halo device, his medicated state, and the 24-hour surveillance by the note-taking officers, were the functional equivalent of the interrogation found to be unconstitutional in Mincey v. Arizona, 437 U.S. 385 (1978). Peerson's reliance on Mincey is misplaced. Mincey's statements were the product of the officer's unrelenting interrogation which continued even after Mincey repeatedly asked the officer to stop the questioning and get him an attorney. When, as here, the officer has posed no question to the defendant, Mincey simply does not apply.
>
> Only questions that are "reasonably likely to elicit an incriminating response" from the defendant can be characterized as "equivalent" to interrogation. Here, the record is devoid of any evidence that Officer Warren acted in any way or said anything that was reasonably likely to elicit an incriminating response. Moreover, given that Peerson was fully aware of Officer Warren's surveillance and notetaking, there was nothing surreptitious about the officer's conduct.
>
> Nor can Peerson argue that his statements to Officer Warren were involuntary due to his physical and emotional suffering. If statements are freely given, spontaneous and not the product of custodial interrogation, they are considered voluntary. In addition, Peerson does not argue that the severity of his condition prohibited him from perceiving the nature of his acts and words. Accordingly, the trial court correctly concluded that, while Peerson's emotional and physical state may affect the weight the jury attributes to the statements, those factors do not affect their admissibility.
>
> Further, absent police interrogation, there can be no infringement on the right to counsel. We therefore find it unnecessary to address Peerson's contention that

the State's failure to appoint counsel for him compelled the trial court to exclude the incriminating statements made to Officer Warren.

Peerson's contention that his statements to his father should have been excluded also fails. A defendant's Miranda rights can be violated only by the State or a person acting as an agent of the State. Thus, the exclusionary rule does not apply to the acts of private individuals. Since Peerson has made no allegation that his father was acting as an arm of the State, his constitutional rights were not infringed, and the statements to his father were properly admitted.

[Some citations omitted]

REQUEST FOR ATTORNEY IN POST-ARREST, PRE-APPEARANCE SCREENING BY PUBLIC DEFENDER MAY INVOKE RIGHT TO COUNSEL UNDER WASHINGTON COURT RULES, EVEN THOUGH REQUEST WOULDN'T TRIGGER CONSTITUTIONAL PROTECTIONS

State v. Greer, 62 Wn. App. 779 (Div. I, 1991)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

At approximately 2 p.m., Sethney reported the events of earlier that morning to the Whatcom County Sheriff's Office. Based on the interview with Sethney, sheriff's detectives arrested Hovde and Barrie in the early hours of October 13, 1988, and transported them to the Whatcom County Jail.

That morning, Barrie was screened in jail by Peggy Wight of the Office of Assigned Counsel (OAC). Barrie advised Wight that he wanted an attorney. Wight determined that he was eligible for appointed counsel and submitted a referral to the public defender's office on his behalf.

A short time later, Peter Guyer, a corrections officer at the jail, received a telephone call from detective Charles Frakes. Guyer testified that Detective Frakes told him that Barrie and Hovde were not to have access to anyone or the phone until they had been interviewed. [**COURT'S FOOTNOTE: Frakes was apparently concerned that Hovde or Barrie may try to communicate with [a codefendant] who had not yet been picked up.]** Guyer advised Frakes that Barrie had been interviewed by the OAC earlier that morning.

At approximately 12:10 p.m., an intern from the public defenders' office arrived at the jail to conduct an intake interview with Barrie and Hovde. Guyer testified that he turned the intern away because the floor officers in the jail were on their lunch break and because he was following Detective Frakes' instructions.

Thereafter, Guyer attempted to telephone Detective Frakes to advise him that the public defender's office had requested to see Barrie. Frakes was eventually paged and arrived at the jail a short time later accompanied by Detective Steve DeFries. The detectives brought Barrie into an interrogation room and advised him of his Miranda rights. It is undisputed that Barrie told the detectives that he understood his rights and wished to waive them. Detective DeFries testified that at no time during the interview did Barrie express a desire to remain silent or request to speak

with an attorney.

Approximately 10 minutes after the detectives began their interview, the intern returned with Jill Bernstein, an attorney with the public defender's office. Bernstein asked to speak with Barrie. Shirley Nicholas, the jail supervisor, explained to Bernstein that it was jail policy not to interrupt an ongoing interview between law enforcement officers and an inmate. At Bernstein's insistence Nicholas advised the officers of Bernstein's desire to see Barrie. However, Detective Frakes informed her that he was not through yet and that the prosecutor's office had said that he could finish his interview.

Soon thereafter, Bernstein returned with a court order directing the detectives to provide her immediate access to Barrie. After briefly consulting with him, Bernstein advised Frakes and DeFries that Barrie preferred not to say any more at that time.

ISSUE AND RULING: Did the continuation of the interrogation of Barrie violate his rights under the 5th Amendment of the Federal Constitution or under Washington Criminal Rule (CrR) 3.1? (ANSWER: Arguably yes, under the court rule, but any error was "harmless") Result: Whatcom County Superior Court conviction of Douglas A. Greer and Frank B. Barrie for first degree robbery and first degree burglary affirmed.

ANALYSIS: The Court of Appeals does not squarely address the 5th Amendment constitutional issues raised by the defendant, although there is an implication in the Court's analysis that the constitutional right to consult counsel was not triggered here because defendant had not asked for counsel during a custodial interrogation. He had only asked for an attorney during a post-arrest screening by the public defender's office. The Court of Appeals says that it will avoid answering the Fifth Amendment constitutional issue because it finds the other evidence of the defendants' guilt so strong that any error in admitting his confession would be harmless constitutional error. The Court of Appeals gives a clearer idea of its views on the application of Washington's criminal rules governing the right to counsel.

The Court of Appeals' analysis of the issues raised by defendant is as follows:

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court established that the Fifth Amendment's prohibition against compelled self-incrimination requires that a custodial interrogation be preceded by advice to the suspect that he has the right to remain silent and the right to the presence to counsel. The Miranda Court recognized, however, that these rights could be waived. In order for the suspect's waiver to be valid, the State must show that it was made voluntarily, knowingly, and intelligently.

In Edwards v. Arizona, 451 U.S. 477 (1981), the Court reaffirmed these rules by establishing that once a suspect asserts the right to counsel, the current interrogation must not only cease, it may not resume "until counsel has been made available to him, unless the accused himself initiates further communication". This is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights."

Here, Barrie first argues that his request for appointed counsel to the OAC interviewer is sufficient to invoke the Edwards rule. We disagree. An OAC employee's referral to the public defender's office of an indigent defendant's

request for representation does not constitute the type of expression necessary to trigger Edwards. At a minimum, the rule of that case requires "some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police."* It is uncontroverted that, during the custodial interrogation, Barrie did not request counsel. **[LED EDITOR'S COMMENT: This language is somewhat ambiguous. We think that generally the request for assistance must be made during a custodial interrogation by law enforcement in order to trigger Miranda. However, if law enforcement interogators learn that the arrestee has made an attempt to contact counsel, we think that they should expressly ask the arrestee whether he or she wishes to proceed without that counsel before proceeding with an interrogation. See our further comments below.]**

Barrie next asserts that the police conduct in this case constitutes the kind of "trick[ery]" that vitiates the validity of his waiver. However, under the United States Supreme Court's decision in Moran v. Burbine, 475 U.S. 412 (1986) and the recent State Supreme Court opinion in State v. Earls, 116 Wn.2d 364 (1991)**[See May '91 LED:02]**, the fact that Barrie voluntarily, knowingly, and intelligently waived his right to counsel before giving his statement is dispositive of his Fifth Amendment and Const. art. 1, § 3 claims.

We recognize that Burbine does not foreclose the possibility that the conduct of the police may be so egregious that due process would be violated. However, we are mindful that "[a] reviewing court should not pass on constitutional matters unless absolutely necessary to its determination of the case." Because we conclude that any error in the admission of his postarrest statements was harmless beyond a reasonable doubt, we do not address the constitutional issue here.

It is long established that constitutional errors may be so insignificant as to be harmless. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." In performing this analysis, Washington courts use an "overwhelming untainted evidence" test. Under this test, the court will look only at the untainted evidence to determine whether that evidence alone is so overwhelming that it necessarily leads to a finding of guilt.

Applying the test here, we are persuaded beyond a reasonable doubt that the overwhelming untainted evidence presented would have led the jury to find Barrie guilty as an accomplice. It is undisputed that Barrie drove Greer and Hovde to Sethney's house to collect the illegal drug debt and that it was Barrie who went to the bank later that day to meet Sethney and collect the money from her. Sethney identified the knife recovered from Barrie at the time of his arrest as similar to the one Greer used to threaten her. She also testified that Greer referred to Barrie as, in essence, his "enforcer". Even if Sethney was not found to be entirely credible by the jury, this characterization was confirmed by the unimpeached testimony of Hovde who accompanied Greer and Barrie to the house. Hovde stated that Barrie clearly played the part of Greer's enforcer by the way he looked the house over and by looking mean. Thus, there was overwhelming evidence, even without Barrie's statement that he walked around the house and "looked mean", of his complicity in the robbery and burglary.

Barrie next contends that the actions of the police here violated CrR 3.1 which provides in pertinent part:

> **(b) Stage of Proceedings.**
> (1) *The right to counsel shall accrue as soon as feasible after the defendant is taken into custody,* appears before a committing magistrate, or is formally charged, whichever occurs earliest.
> . . .
> **(c) Explaining the Availability of a Lawyer.**
> . . .
> (2) At the earliest opportunity a person in custody who desires counsel shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning counsel, and *any other means necessary to place the person in communication with a lawyer."*

[Emphasis by Court]

The Court of Appeals declares that "the actions of the jail personnel and the detectives deliberately thwarted the purpose of CrR 3.1, which is to provide a suspect with access to an attorney at the earliest opportunity." Again, the Court of Appeals declares that any error under CrR 3.1 in admitting the post-arrest statement was immaterial to the outcome of the case, and therefore clearly harmless under the less stringent "harmless error" for non-constitutional violations. However, the Court of Appeals adds the following warning:

> However, because this error will usually not be "harmless", we emphasize that when a defendant has expressed a desire for counsel, the deliberate interference with counsel's efforts to communicate with the defendant is violative of CrR 3.1.

LED EDITOR'S COMMENT:

After the State Supreme Court announced its decision in State v. Earls, 116 Wn.2d 364 (1991), we advised in the May '91 LED that law enforcement officers were not required to advise an arrestee in custody of counsel's attempts to contact the arrestee unless the arrestee had expressly requested counsel during custodial interrogation. This assumes that: (1) the arrestee's right to counsel under the Sixth Amendment had not yet accrued as the result of the prosecutor's filing of an information, and (2) that "initiation of contact" rules under the Fifth and Sixth Amendments had not been triggered by a prior request for counsel during custodial interrogation or a court appearance. See September 1988 LED for a seven-page article on the "Initiation of Contact" rules, and see cases discussed at Feb. '91 LED:01 and at Sept. '91 LED:10.

The Greer case places one additional twist on the interrogation situation. Although the Court of Appeals avoids a definitive ruling on the matter, the rule which we think officers should follow when faced with the Greer facts is as follows:

> **IF LAW ENFORCEMENT OFFICERS, INCLUDING CORRECTIONS PERSONNEL, LEARN THAT A SUSPECT HAS MADE A POST-ARREST REQUEST FOR COUNSEL IN A NON-CUSTODIAL, NON-APPEARANCE SITUATION SUCH AS A POST-ARREST SCREENING BY THE PUBLIC DEFENDER'S OFFICE, THEN, IN ADDITION TO ADMINISTERING STANDARD MIRANDA WARNINGS, THE LAW ENFORCEMENT INTERROGATORS**

SHOULD: (A) ADVISE THE SUSPECT OF ANY KNOWN ATTEMPTS BY COUNSEL TO CONTACT THE SUSPECT, AND (B) ASK THE SUSPECT WHETHER HE OR SHE WISHES TO CONSULT COUNSEL BEFORE PROCEEDING WITH THE INTERROGATION. IF THE SUSPECT SAYS THAT HE OR SHE WISHES TO PROCEED WITH THE QUESTIONING, THEN A VALID WAIVER OF RIGHTS UNDER CrR 3.1 CAN BE OBTAINED WITHOUT THE PRESENCE OR PARTICIPATION OF COUNSEL.

PROVING "SEXUAL CONTACT" ELEMENT OF CHILD MOLESTING LAW REQUIRES MORE THAN MERE EVIDENCE OF TOUCHING INTIMATE PARTS THROUGH VICTIM'S CLOTHING

State v. Powell, 62 Wn. App. 914 (Div. III, 1991)

Facts: (Excerpted from Court of Appeals opinion)

> According to Windy, in the weeks preceding Thanksgiving a man she knew as Uncle Harry, while she was seated on his lap, hugged her around the chest. As he assisted her off his lap he placed his hand on her "front" and bottom on her underpanties under her skirt. On another occasion, while Windy was alone with Uncle Harry in his truck waiting for her cousin, he touched both her thighs. On both occasions, he only touched her on the outside of her clothing. Windy identified Mr. Powell as Uncle Harry. She was unable to describe how he touched her.

Proceedings:

Harry Norman Powell was tried and convicted on the charge of first degree child molestation.

ISSUE AND RULING: Was sufficient evidence of the "sexual gratification" aspect of the "sexual contact" element of first degree child molestation submitted to the jury to support the guilty verdict? (ANSWER: No) Result: Spokane County Superior Court conviction for first degree child molestation reversed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Sexual contact is a statutory element of first degree child molestation.
>
> > "Sexual contact" means any touching of the sexual or other intimate parts of a person *done for the purpose of gratifying sexual desire of either party.*
> >
> > [Court's emphasis]. RCW 9A.44.010(2).
>
> Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification. However, in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, **[COURT'S FOOTNOTE: The term "intimate parts" has been interpreted to have a broader connotation than sexual and to include "parts of the body in close proximity to the primary erogenous areas . . ." including**

the hips, buttocks, and lower abdomen. In re Adams, 24 Wn. App. 517 (1979).] the courts have required some additional evidence of sexual gratification. . . .

Here, the evidence of Mr. Powell's purpose in both touchings is equivocal. According to Windy, while she was sitting on his lap he hugged her about the chest and later touched her bottom while lifting her off his lap. The record suggests it was a fleeting touch. The evidence he touched her genital area consisted solely of her statement he touched her underpanties "in the front part". She did not remember how he touched her. She said, "Hey. Stop it.", and he said, "Oops" and stopped. His touching her thighs, which occurred in his truck, is also susceptible of innocent explanation. She was clothed on each occasion and the touch was on the outside of her clothes. No threats, bribes, or requests not to tell were made.

Mr. Powell testified he was affectionate with children and if she said he touched her it was possible he hugged and touched her. He denied ever touching her under her skirt or touching her for sexual gratification. No rational trier of fact could find this essential element beyond reasonable doubt. Thus we reverse and dismiss.

[Some citations omitted]

MISDEMEANANT FAILURE TO RETURN FROM WORK RELEASE, FURLOUGH IS "ESCAPE"

State v. Kent, 62 Wn. App. 485 (Div. II, 1991)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

On June 29, 1989, Kent left the jail for work with permission but failed to return. Smith was serving time in the Cowlitz County Jail for misdemeanor fines. He injured his back after 15 days in the work release program. They placed him in the medical unit and gave him a temporary release to see a neurologist. This release extended from November 9 to November 15, 1989. Smith failed to return on time.

The State charged both defendants with escape in the second degree, RCW 9A.76.120(1)(a). The trial court dismissed the charges against both defendants because it found that the term "escape" requires "some actual physical leaving of confinement without permission." The trial court found that because the defendants left the jail with permission they could not have escaped.

ISSUE AND RULING: Does "escape" require a fleeing from direct physical control (i.e., Did the facts of this case fail to constitute "escape" because there was no flight from direct physical control?) (ANSWER: No) Result: Cowlitz County Superior Court order dismissing escape charges reversed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

We find that the trial court erred in concluding that the defendants' failure to return from work release or medical furlough did not constitute escape in the second degree. RCW 9A.76.120(1)(a) states: "A person is guilty of *escape* in the second degree is: . . . (a) He escapes from a detention facility . . .". RCW 9A.76.010(2)(e)

defines "Detention facility" as "any *place* used for the confinement of a person . . . (e) in any work release, furlough, or other such facility or program . . .". [Court's emphasis] A "place" is "any area in which a person is permitted to go or remain according to the terms of his work release, furlough or comparable program."

As the Legislature has not defined "escape", the common ordinary definition of the term applies. An "escape" is an "evasion or deliverance from what confines, limits, or holds . . .; *specif*: an unlawful departure of a prisoner from the limits of his custody". "Common usage of the word 'escape' imports leaving physical confinement without permission."

We find the Peters decision controlling. There the court defined escape under RCW 9A.76.120(1)(a): "A person who, while on work release or furlough, is not within the area where he is authorized to be at a particular time, or a person who has remained in an area where he was authorized to go beyond the time permitted him, has escaped 'from a detention facility'." State v. Peters, 35 Wn. App. 427 (1983)

Kent and Smith contend that the Legislature could not have intended the meaning the State suggests because, under that interpretation, the enactment of RCW 72.66.060 makes RCW 9A.76.120(1)(a) superfluous. We disagree. RCW 72.66.060 is a specific statute applying to felons under the control of the Department of Corrections. See State v. Danforth, 97 Wn.2d 255 (1982) (when a special statute punishes the same conduct which a general statute punishes, the State can only charge the accused under the special statute). RCW 72.66.060 does not apply to misdemeanants or to felons under the County's custody. These prisoners are subject to criminal liability under RCW 9A.76.120(1)(a). The defendants also contend that Peters does not control because they were not under direct physical control or custody and because they did not run or flee from their place of confinement.

Clearly, these defendants departed from the limits of their custody without permission by not returning to the facility. Nothing in the statute suggests that an escape only occurs when one is subject to direct physical control. To escape, one need not run or flee from custody; as the court stated in Peters, one need only be where he or she is not supposed to be or fail to be where he or she is supposed to be. This latter situation is precisely the case here.

[Some footnotes and citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) STATE MUST SHOW NO BREATH TESTING EQUIPMENT AVAILABLE AT HOSPITAL TO JUSTIFY OFFERING ONLY BLOOD TEST TO DWI ARRESTEE AT HOSPITAL -- In O'Neill v. Dept. of Licensing, 62 Wn. App. 112 (Div. I, 1991) the Court of Appeals agrees with O'Neill's challenge to the Superior Court proceedings which affirmed his driver's license revocation by DOL. O'Neill had been taken to Seattle's Harborview Hospital with back pain following his DWI arrest on probable cause (the arrest by the officer at the scene was held to be lawful by the Appeals Court based on the evidence of O'Neill's intoxication, the circumstances of the 2 a.m. accident in which several parked cars were struck, and O'Neill's non-credible explanation of the circumstances of the accident). The Appeals Court describes what happened

at the hospital:

> When they arrived, [the officer] read O'Neill his implied consent warnings and asked him to submit to a blood test. O'Neill refused. [The officer] never gave O'Neill the opportunity to take a breath test and O'Neill never requested one.

O'Neill's license was revoked for his refusal of the blood test. At the trial reviewing the revocation, the arresting officer testified that he did not check whether Harborview Hospital had breath testing equipment, but he did not "believe" that Harborview did.

O'Neill's challenge to the jury verdict affirming his license revocation for his refusal of a blood test was based upon the trial court's failure to explain to the jury that, under implied consent law, a DWI arrestee (as opposed to a vehicular assault or vehicular homicide arrestee -- see LED EDITOR'S NOTE below regarding the latter situations) may lawfully be asked to submit to a blood test (as opposed to the less intrusive breath test) only under certain statutorily specified circumstances. Those circumstances are specified under RCW 46.20.308 which provides in relevant part that if:

> (a) The person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample; *or (b) as a result of a traffic accident the person is being treated for a medical condition in a hospital, clinic, doctor's office, or other similar facility in which a breath testing instrument is not present, a blood test shall be administered* by a qualified person as provided in RCW 46.61.506(4).

The Appeals Court agrees with O'Neill that the jury was not properly instructed and remands the case for retrial on the issue of whether the officer's decision to offer a blood test rather than a breath test violated the implied consent statute. DOL will need to prove that Harborview Hospital had no breath testing equipment available when the blood test was offered.

Result: King County Superior Court decision affirming license revocation reversed, case remanded for trial.

LED EDITOR'S NOTE: There are other circumstances for administering a blood test to an arrestee. In the following circumstances specified under RCW 46.20.308(3), as an exception to the consent rule of the statute, a blood test may be forcibly administered to an arrestee:

> **(3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520 or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which another person has been injured and there is a reasonable likelihood that such other person may die as a result of injuries sustained in the accident, a breath or blood test may be administered without the consent of the individual so arrested.**

For recent cases interpreting and upholding the validity of this subsection of RCW 46.20.308, see State v. Curran, 116 Wn.2d 174 (1991) April '91 LED:03, and State v. Schulze,

116 Wn.2d 154 (1991) April '91 LED:02.

LED EDITOR'S COMMENTS REGARDING THE CONSTITUTIONALITY OF DRAWING BLOOD PURSUANT TO RCW 46.20.308: We have recently received inquiries regarding two Fourth Amendment questions regarding the forcible extraction of blood from certain criminal traffic violators. RCW 46.20.308(3) authorizes the forcible taking of blood as set forth in the preceding Editor's Note. In addition, RCW 46.61.506(4) provides the following requirement for the taking of blood:

> **(4) When a blood test is administered under the provisions of RCW 46.20.308, the withdrawal of blood for the purpose of determining its alcoholic content may be performed only by a physician, a registered nurse, or a qualified technician. This limitation shall not apply to the taking of breath specimens.**

The issues which we have been asked to informally consider are as follows: (1) May blood be forcibly drawn from a vehicular homicide or vehicular assault arrestee in the absence of probable cause to believe that the arrestee has recently consumed or is presently under the influence of alcohol or drugs? and (2) In those situations where focible extraction of blood is allowed under RCW 46.20.308, what are the limits on the use of force to obtain the blood where the arrestee resists?

(1) Probable Cause Requirement

In Schmerber v. California, 384 U.S. 757 (1966) the U.S. Supreme Court held that it did not violate the Fourth Amendment for police, without a warrant and without consent, but with probable cause to believe that a hospitalized vehicle operator had been driving under the influence of alcohol, to cause a blood sample to be taken from the suspect after he had refused to take a breathalyzer test. The Court in Schmerber emphasized that the fact that probable cause was present was a factor supporting its decision that the forcible extraction of blood without a warrant is reasonable under the Fourth Amendment.

RCW 46.20.308 does not expressly include a probable cause requirement for extracting blood from arrestees. On its face, the statute appears to allow the forcible, warrantless extraction of blood from a vehicular assault arrestee or a vehicular homicide arrestee despite the absence of evidence of alcohol consumption or illegal drug use by the arrestee.

However, we believe that Schmerber and the Fourth Amendment preclude the forcible extraction of blood in the absence of probable cause to believe that evidence of recent alcohol or drug use will be found in the blood. See State v. Curran, 116 Wn.2d 174 (1991) April '91 LED:03 and State v. Judge, 100 Wn.2d 706 (1984).

(2) Limits On The Use Of Force

In the vehicular assault or vehicular homicide situation, the statute does not specify any limits on the use of force to extract blood from a resisting arrestee. However, the Fourth Amendment does impose some limitations on forcibly extracting blood from a resistant suspect. Use of force must be both reasonable and necessary.

Probably the most significant question is whether an arrestee who particularly objects to

the drawing of blood and offers mild physical resistance should be offered the alternative of a breath test or of providing a urine sample before physical force is applied to extract the blood. A recent Ninth Circuit Court of Appeals opinion addressed this issue under a California implied consent statute which requires that a person must give either a breath, blood or urine sample upon arrest for DWI. See Hammer v. Gross, 932 F.2d 842 (9th Cir. 1991) The Ninth Circuit's opinion in this Civil Rights suit is not dispositive because: (1) the voting of the en banc court is badly splintered, (2) the case involved a mere DWI arrest, and (3) the case involved a California statute which: (a) requires that the DWI arrestee submit to one of the three tests, and (b) expressly requires that alternative tests be offered by the officers if the arrestee does not wish to have blood extracted and is willing to submit to an alternative test.

Nonetheless, officers should consider offering the vehicular assault or vehicular homicide arrestee the opportunity to provide a breath or urine sample if he or she physically resists the taking of blood. RCW 46.20.308(3) says that "a breath or blood test may be administered without the consent" of the arrestee in these situations -- arguably, the arrestee who wishes to provide a breath sample instead of a blood sample in these situations should be allowed to do so if there is a machine readily available for that purpose. Consult your prosecutor, city attorney or legal advisor.

(2) DRUG PARAPHERNALIA USAGE STATUTE AND DRUG POSSESSION STATUTE ARE NOT CONCURRENT STATUTES -- In State v. Williams, 62 Wn. App. 748 (Div. I, 1991) the Court of Appeals holds that RCW 69.50.412(1), which prohibits the use of drug paraphernalia, and RCW 69.50.401(d), which prohibits the possession of controlled substances, are not concurrent statutes. Therefore, a person found with identifiable drug residue in an item of drug paraphernalia need not be charged with use of drug paraphernalia but may be charged with drug possession. Result: King County Superior Court conviction (based on residue of cocaine found in a metal smoking pipe) affirmed.

(3) EXTREME INTOXICATION, VOLUNTARY OR INVOLUNTARY, GENERALLY DOES NOT MAKE DRIVER INCAPABLE OF GIVING VALID REFUSAL OF ALCOHOL BREATH TEST -- In Steffan v. Dept. of Licensing, 61 Wn. App. 839 (Div. III, 1991) Ms. Steffan challenged DOL's revocation of her driver's license. She argued that at the time of her arrest she was so intoxicated (due to voluntary ingestion of small amounts of alcohol and an involuntary ingestion of drugs) that she was not capable of refusing consent to a breath test offered her by a State trooper who had arrested her for DWI.

The issue she raised required interpretation of RCW 46.20.308 which provides that where a DWI arrestee is "dead, unconscious, or . . . otherwise in a condition rendering him or her incapable of refusal . . ." the person is not capable of refusing the breath test and should instead be subjected to an involuntary blood test. **[LED EDITOR'S NOTE: The Court of Appeals opinion is not a model of clarity, so we are guessing in part at the Court's analysis and holding. Our explanation may not be any clearer than that of the Court of Appeals; a need for brevity is our excuse.]**

The Court of Appeals looks at several past cases to resolve the implied consent issue. The Court first notes that the undefined statutory term, "unconscious", means that one is "without awareness, sensation or cognition." The Appeals Court apparently rules that Steffan had sufficient awareness, sensation and cognition to defeat her argument that she was "unconscious" at the time of the request.

The Appeals Court then goes on to reject Steffan's alternative argument that she was a person "otherwise in a condition rendering him or her incapable of refusal. . ." under RCW 46.20.308. The Appeals Court declares that the degree of a driver's intoxication (whether from drugs or alcohol, and whether from voluntary or involuntary intoxication) will not generally be a consideration under the statute "in determining whether the arresting officers afforded the driver the opportunity to exercise an intelligent judgment" [an "opportunity" is all that the statute requires, the Court of Appeals emphasizes]. The trooper gave her an opportunity to refuse consent, and she was not totally unconscious or otherwise physically incapable of consenting. Accordingly, the revocation of her license for her refusal of the breath test was lawful, the Court of Appeals holds.

Result: Grant County Superior Court decision upholding DOL license revocation affirmed.

(4) "SUBSTANTIAL STEP" EVIDENCE SUPPORTS ATTEMPTED KIDNAPPING CONVICTION -- In State v. Billups, 62 Wn. App. 122 (Div. I, 1991) the Court of Appeals rules that the following facts were sufficient evidence of a "substantial step" towards abduction to support Billups' conviction for attempted kidnapping:

> At approximately 1 p.m. on July 7, 1989, two girls, ages 10 and 11, were walking toward the Ballard locks, where they planned to picnic. As they approached the intersection of 58th and 32nd Streets, one of the girls noticed an orange Volkswagen van. The van stopped at the intersection as the girls prepared to cross the street in front of it. The driver of the van, Billups, leaned out of the window and said, "Hi girls. I'll pay you a dollar if you'll come down to Shilshole with me." Frightened, the girls ran across the street to a nearby house where they were allowed to use the telephone to call one of their mothers. The incident was promptly reported to the police, who responded to the call and obtained a description of the vehicle and its driver from the two girls. The officers drove to Golden Gardens Park, located at the northern end of Shilshole Bay, where they found a vehicle matching the description given by the girls. Billups was sitting alone in the vehicle, and as one of the officers approached, he lay down on the floor of the vehicle in an apparent effort to avoid detection. After Billups exited the van, one of the officers noticed a small homemade knife taped to the driver's side door and a large hunting-type knife on the floor next to the passenger door.
>
> After his arrest, Billups initially denied any contact with the girls. He later acknowledged that he had lied because he was scared and that he had in fact spoken to the girls. He claimed he told the girls, "I'd give you a dollar if you tell me where Woodland Park is."
>
> At trial, 11-year-old A.H. was permitted to testify over objection that in June 1989, she saw an orange Volkswagen van parked within one or two blocks of the incident herein. After she exited her school bus, the van pulled up and stopped near her. The driver stepped part of the way out of the van and began to ask her questions. He said, "'Hi. How are you?' . . . 'Where are you going and what are you doing?'" This alarmed her and she went directly home. Although A.H. was unable to identify Billups from a photo montage shortly after the incident, she was able to identify him as the driver of the van at trial.

The Court of Appeals holds that although the testimony of A.H. concerning the June 1989 incident was prejudicial and was not probative of criminal intent and therefore should have been excluded as irrelevant evidence, its admission was "harmless error." The Court of Appeals goes on to rule

that even without the testimony of A.H. there was sufficient evidence of a "substantial step" towards abduction in the other children's account of the July 1989 incident to support Billups' convictions under the attempt statute. Result: King County Superior Court convictions for second degree attempted kidnapping affirmed.

(5) ***"SUBSTANTIAL STEP" EVIDENCE SUPPORTS ATTEMPTED RAPE CONVICTION*** -- In State v. Jackson, 62 Wn. App. 53 (Div. I, 1991) the Court of Appeals holds that the following evidence was sufficient evidence of a substantial step to support a conviction for attempted rape:

> Sometime in November 1988, Jackson became acquainted with Susan K. They discussed employment options, and Jackson told Susan that he would try to help her find a job at one of his two employers. For the next few days, Jackson visited Susan's apartment frequently, ostensibly to further his efforts to help her find employment. On one of these occasions, Susan complied with a request by Jackson that she remove all of her clothing so that Jackson could measure her for a uniform. In the course of taking her measurements, Jackson touched Susan's vagina. Susan then put her clothes back on. Jackson, who was fully clothed, pulled her down on a bed, lay on top of her, and moved around as if he were having sexual intercourse. Susan asked Jackson to get up; Jackson eventually did as she asked.
>
> Several days later, on the evening of December 1, 1988, Jackson returned to Susan's apartment, where he found her 14-year-old daughter, "Z", home alone. Z told Jackson that her mother was not there, and asked whether he would like to leave a message. Jackson came inside to write a note. While inside, Jackson asked Z to find out what size clothes her mother wore. Z went into the bedroom to get this information. As she started to walk out of the bedroom, she saw Jackson walking toward her. Z backed into the bedroom; Jackson followed. When Jackson was within 2 feet of Z, he told her to lift up her skirt or he would kill her. Z said "No", and continued to back up. When she had backed up as far as she could, Z screamed. Jackson said he "was just joking". Z then told Jackson to get out and Jackson left.
>
> When Susan returned home Z told her what had happened. Susan called the police.

The Appeals Court notes that prior Washington cases had imposed a fairly stringent standard in attempted rape cases, apparently requiring proof that defendant had made an overt act toward penetration of his victim with an erect penis. However, the present law of "attempt" adopted under Title 9A RCW in 1975 is less stringent than the standard articulated in the pre-1975 Washington cases. The Appeals Court notes that the "substantial step" requirement is met under Washington's current law by proof of:

> . . . "lying in wait, searching for or following the contemplated victim of the crime;" . . . "enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;" and . . . "unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed".

The evidence in this case meets the substantial step standard, the Court of Appeals holds.

Result: reversal of King County Superior Court conviction for attempted second degree rape; the

conviction was reversed on grounds that the jury was improperly instructed (your LED Editor has chosen not to address the issue concerning the jury instructions); case remanded for re-trial.

(6) STATUTE DEFINING CRIME OF DISOBEYING A VALID ORDER BY SCHOOL OFFICIAL TO LEAVE SCHOOL PROPERTY DOES NOT PRECLUDE CHARGE FOR CRIMINAL TRESPASS IN TRESPASS AT SCHOOL -- In State v. Shelby, 61 Wn. App. 214 (Div. I, 1991) the Court of Appeals holds that RCW 9A.52.080, which defines the crime of second degree criminal trespass, and RCW 28A.87.055, which defines the crime of disobeying a valid order to leave school property, do not address the same conduct and are not "concurrent" statutes. The state is therefore not required to charge a person who has refused an order to leave school grounds under RCW 28A.87.055 to the exclusion of RCW 9A.52.080. Result: King County Superior Court conviction for criminal trespass (RCW 9A.52.080) affirmed.

(7) MUTUAL AID PEACE OFFICER POWERS ACT UPHELD; COURT ALSO HOLDS THAT EXISTENCE OF MAPOPA CONSENT LETTER MAY BE PROVEN WITHOUT DOCUMENTARY EVIDENCE -- In Ghaffari v. DOL, 62 Wn. App. 870 (Div. I, 1991) the Court of Appeals rejects several challenges raised by Ghaffari to his driver's license revocation under the implied consent law. Ghaffari argued that the city officer who arrested him had no authority to make an arrest outside the city limits of the officer's employing agency. DOL successfully argued that the officer had authority to make the DWI arrest because the chief of police of the neighboring city where the arrest was made had consented to such an exercise of arrest powers in that city.

The Appeals Court holds: (a) that there was sufficient evidence that the officer was acting under a consent letter issued under Chapter 10.93 RCW by the chief of police of the neighboring city where the DWI arrest was made, even without documentary evidence to that effect (initially, a copy of the consent letter was not placed in evidence, but the officer testified that he had previously seen and read the consent letter issued under the Mutual Aid Peace Officer Powers Act -- MAPOPA -- and was able to generally describe its contents); the Court of Appeals holds that such testimony is sufficient proof of the existence of the consent letter to satisfy the statute; (b) that in any event, actual copies of the consent letter were eventually put in evidence by the DOL in a timely fashion in response to Ghaffari's motion for reconsideration; and (c) that the MAPOPA is not constitutionally defective for its failure, as alleged by the defendant, to set forth safeguards (to prevent arbitrary enforcement) "for determining (a) how the public is to be notified with regard to when and to whom written consent is granted and (b) how long such consent may remain in effect." Result: King County Superior Court ruling upholding the driver's license revocation affirmed.

(8) ***CIVIL LIABILITY -- NO STATE CAUSE OF ACTION FOR "NEGLIGENT INVESTIGATION"*** -- In Dever v. Fowler, 63 Wn. App. 35 (Div. I, 1991) the Court of Appeals holds that there is no independent cause of action under Washington law for negligent investigation by a law enforcement investigator. The Court of Appeals recognizes that an arson suspect against whom arson charges were filed and then dismissed could lawfully sue the arson investigator in this case and the investigator's public employer and others for malicious prosecution on a theory that the arson investigator: (1) recklessly disregarded the suspect's right to be charged based on probable cause, (2) did not have probable cause to believe the suspect committed the suspected arson fire, and (3) exerted undue influence on certain prosecutors to file the arson charges against the suspect. However, a cause of action based solely on allegedly negligent investigation is not recognized under Washington law, the Appeals Court holds. Result: King County Superior Court dismissal of negligent investigation claim affirmed; case remanded for re-trial on malicious prosecution claim on grounds that trial court instructions imposed an overly stringent standard of proof on the plaintiff.

(9) ***"AVAILABILITY" UNDER CHILD SEX ABUSE VICTIM HEARSAY LAW CONSTRUED; "TREATING PHYSICIAN" HEARSAY RULE ALSO CONSTRUED - STATE PREVAILS*** -- In State v. Bishop, 63 Wn. App. 15 (Div. I, 1991) the Court of Appeals holds that where an alleged child sexual abuse victim was present in court to testify, the child witness was "available" for purposes of RCW 9A.44.120, the child sexual offense victim hearsay statute (and for purposes of the 6th Amendment "confrontation clause") even though the child was unwilling or unable to answer some of defense counsel's significant questions as to whether defendant penetrated the victim's vagina. Because the witness was "available", the prosecution was not required to submit proof corroborating the hearsay statements of the child to a pediatrician and to a sexual assault interview specialist.

Additionally, the Court of Appeals holds that the child's statement to her pediatrician were independently admissible under an established hearsay exception. A pediatrician treating a possible child sex abuse victim reasonably can be expected to inquire into the sex abuse in order to treat for both physical and emotional injuries. Therefore, regardless of the applicability of RCW 9A.44.120, statements made by the child victim here to her treating pediatrician were admissible under Evidence Rule (ER) 803(a)(4), because ER 803(a)(4) provides an exception to the hearsay rule allowing for the admission of hearsay statements made for purposes of medical diagnosis or treatment. Result: Snohomish County Superior Court conviction for first degree rape of a child affirmed.

(10) ***CHILD MOLESTING IS NOT A LESSER INCLUDED CRIME IN RAPE OF A CHILD*** -- In State v. Saiz, 63 Wn. App. 1 (Div. II, 1991) the Court of Appeals holds that child molestation (which has as an element "sexual contact" as defined in RCW 9A.44.010) is not a lesser included offense of rape of a child (which has as an element "sexual intercourse" as defined in RCW 9A.44.010). Because these crimes have different elements (e.g., to prove "sexual contact" the prosecution must show that an unlawful sexual touching was done for the purpose of sexual gratification, while the proof of "sexual intercourse" does not require the proof of any mental state), the trial court erred in this case in allowing the jury to convict defendant of child molestation as a lesser included crime where the charge against him was rape of a child. Result: Clark County Superior Court conviction of first degree child molestation reversed (note that one first degree child molestation conviction against Saiz on a separate count which did not have the above-noted defect was affirmed by the Court of Appeals).

(11) ***PARENTS CANNOT BE SUED FOR JUVENILE SON'S SHOOTING OF OFFICER WHERE THEY HAD NO PRIOR KNOWLEDGE OF THEIR SON'S PROPENSITY FOR VIOLENCE*** -- In Barrett v. Pacheco, 62 Wn. App. 717 (Div. I, 1991) the Court of Appeals upholds a trial court summary judgment dismissal of a lawsuit filed by a police officer seeking damages for negligent supervision from the parents of a juvenile (14 years old) who had shot the officer. The Court of Appeals holds that because the facts known to the parents about their son (as proven primarily through testimony from the parents) while demonstrating their son's propensity for criminality, did not demonstrate a propensity for violence, the parents could not be held responsible for their son's violent act against the police officer. Result: Snohomish County Superior Court summary judgment order dismissing the lawsuit affirmed.

(12) ***CO-DEFENDANT'S OUT-OF-COURT CONFESSION ADMISSIBLE UNDER RELIABILITY STANDARD*** -- In State v. Hutcheson, 62 Wn. App. 282 (Div. I, 1991) the Court of Appeals rejects a contract killer's challenge to admission of hearsay evidence of a confession by the woman who had hired him to commit the murder. The Court of Appeals notes that the Sixth Amendment confrontation clause allows the hearsay evidence of an "unavailable" (due to

assertion of Fifth Amendment rights) co-defendant's confession to be admitted into evidence against a defendant only after a weighing of nine reliability factors. According to a headnote to the opinion of the Court, those factors are: (1) whether the declarant had an apparent motive to lie; (2) the declarant's general character; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; (5) whether trustworthiness is suggested from the timing of the statements and the relationship between the declarant and witness; (6) whether the statements contain express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross examination; (8) the remoteness of the possibility of the declarant's recollection being faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement. Not all the factors need support a reliability determination to reach a determination that the statements are reliable, but they all should be considered. Result: King County Superior Court conviction of aggravated first degree murder affirmed.

LED EDITOR'S NOTE: The woman who had paid Hutcheson to commit the murder was tried separately several months after his trial, and she was also convicted of aggravated first degree murder.

(13) ***BLOOD ALCOHOL TESTING REGULATIONS MEET STATUTORY STANDARDS; ALSO, BLOOD SAMPLE PROPERLY PRESERVED FOR PURPOSES OF DUE PROCESS ANALYSIS*** -- In State v. Clark, 62 Wn. App. 263 (Div. I, 1991) the Court of Appeals rejects a vehicular homicide defendant's challenges to the administrative regulations under which his post-arrest blood test was conducted. Relying on State v. Schulze, 116 Wn.2d 154 (1991) April'91 LED:02 the Court of Appeals holds that the state toxicologist's regulations at WAC 448-14 for blood alcohol testing are sufficiently detailed to satisfy the requirements of RCW 46.61.506(3). The Court also rejects defendant's due process challenge regarding the evidence on preservation of the blood sample. Result: King County Superior Court vehicular homicide conviction affirmed.

(14) ***PUBLIC DUTY DOCTRINE PRECLUDES CIVIL SUIT AGAINST DEPARTMENT OF CORRECTIONS FOR FAILURE TO PROTECT*** -- In Forest v. State, 62 Wn. App. 363 (Div. II, 1991) the Court of Appeals affirms a trial court summary judgment order dismissing lawsuits filed against the State Department of Corrections by persons who had been harmed by a parolee. The victims had alleged that the parolee's community corrections officer (CCO) would have prevented their harm if the CCO had instituted parole violation proceedings against him. The Court of Appeals holds that the "public duty doctrine" precludes such a lawsuit under the facts of this case.

The Court of Appeals rejects the victims' argument that their situation was similar to that in Bailey v. Forks, 108 Wn.2d 262 (1987) Aug. '87 LED:12 where the State Supreme Court held that the public duty doctrine does not immunize the government from a "failure to protect" lawsuit brought by the victims of a drunk driver. The Bailey v. Forks decision was grounded in the ruling by the State Supreme Court that Washington statutes mandate that a drunk driver be taken into custody when observed by a law enforcement officer. The Supreme Court held in Bailey that the officer had a special duty to arrest the DWI suspect under Washington law, and therefore the "public duty doctine" did not preclude the lawsuit.

Here, however, the alleged parole violations by the parolee were at most technical violations, and hence could not be said to call for mandatory duty to take any action, much less make an arrest. More important, the Court of Appeals rejects the victims' argument that they are within the class of persons that the parole statutes were intended to protect (such specific statutory inclusion, express or implied, is a requirement of the Bailey v. Forks exception to the public duty doctrine). On this point, the Court of Appeals declares:

Arguably, parole statutes that provide for the supervision of parolees are intended to protect the public from unrehabilitated convicts. See January v. Porter, 75 Wn.2d 768 (1969) (parole may be rehabilitative but is also risky business for society). However, this function is not the most important consideration. A decision that parole statutes are primarily designed to protect the public would effectively undermine the parole system. The State, in an attempt to limit its liability, would be compelled to reincarcerate parolees for even minor infractions or parole conditions. Clearly, this result would eliminate the beneficial and rehabilitative functions of parole. That is not in the public interest. Parole statutes facilitate the rehabilitative process by providing support and supervision before full release into the community; they are not, in our judgment, primarily intended to protect the public.

Because there is no mandatory action required of parole officers and because the purpose of the parole statutes is not primarily to protect the public the "failure to enforce" exception to the public duty doctrine has no application.

Result: Pierce County Superior Court summary judgment ruling in favor of the State affirmed.

(15) ***STATUTE OF LIMITATIONS FOR EXCESSIVE FORCE, FALSE ARREST CIVIL ACTIONS IS TWO YEARS*** -- In Boyles v. City of Kennewick, 62 Wn. App. 174 (Div. III, 1991) the Court of Appeals rules that a lawsuit by Janet Boyles for unlawful arrest and excessive force was barred by the two-year statute of limitations for "assault and battery" and "false arrest" actions. Boyles had tried to amend her lawsuit against the City to include a claim of "negligence" by the arresting officers (to take advantage of the longer statute of limitations for negligence lawsuits) but the Court of Appeals rules that the original lawsuit was too narrowly framed to allow her to amend her complaint in this manner. Result: Benton County Superior Court reversed; judgment granted to the City of Kennewick.

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NEXT MONTH

In the March LED we will digest, among other cases, the January 2, 1992 Washington State Supreme Court decision in the O'Hartigan case, a 6-3 decision of the State Supreme Court upholding the right of the State Patrol under RCW 49.44.130 to require that applicants for both clerical and sworn positions submit to polygraph examinations.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions expresses the thinking of the writer and does not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.